IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLINT DIDIER, MATTHEW MORELL,
KEVIN HEINEN, JOHN LOGUE, and
PARKER OLSEN,

Petitioners,

v.

KING COUNTY SUPERIOR COURT,

Respondents.

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

In the November general election, Initiative Number 976 (I-976) was passed by the people of this state, 1,055,749 (52.99%) voting in favor, and 936,751 (47.01%) voting against. Tim Eyman, Jack Fagan and Mike Fagan were the sponsors of this initiative. Of the counties in this State, only six counties failed to adopt the measure: Whatcom, San Juan, Island, King, Thurston and Jefferson. See Appendix A.

Following this vote, Garfield County Transportation Authority, King County, the City of Seattle, Washington State Transit Association, the Association of Washington Cities, the Port of Seattle, Intercity Transit, the Amalgamated Transit Union, the Legislative Council of Washington and Michael Rogers filed suit in King County seeking a preliminary injunction. (King County Case No. 19-2-30171-6). See Appendix B.

The Attorney General appeared on behalf of the defendant State of Washington, and King County Superior Court Judge Marshall Ferguson heard a motion for preliminary injunction on November 26 and entered the same, finding that plaintiffs were likely to prevail on establishing the unconstitutionality of I-976 beyond a reasonable doubt. See Appendix C.

Petitioners made a demand on the AG to represent their interests in the King County litigation and received a form response. See Appendix D. Declaration of Stephen Pidgeon. Petitioners recognize that making a claim on the AG to represent the interests of taxpayers who voted in favor of I-976 would be futile. See Appendix D. Petitioners sought in the first instance to object to the venue to hear such a motion, and to demand disqualification of the entire King County Superior Court bench. Such a request was made of the AG by Tim Eyman, and the same was denied by the AG. Eyman's declaration was filed in support of Petitioner's motion to intervene. See Appendix D, Declaration of Tim Eyman.

Petitioners therefore assert taxpayer standing to raise this claim and to seek Mandamus requiring the King County Superior Court through the office of the Presiding Judge to vacate the injunction entered on November 27, 2019 by Judge Marshall Ferguson, and to transfer venue and jurisdiction directly to this Court.

ASSIGNMENTS OF ERROR

Respondent King County Superior Court erred when is retained venue and jurisdiction over a cause of action brought in part by King County, who was in violation of RCW 42.17A.55.

STATEMENT OF THE CASE

On November 5, 2019, Initiative Number 976 (I-976) was passed by Washington voters. See Appendix A – Washington State Election Results. Garfield County Transportation Authority, King County, the City of Seattle, Washington State Transit Association, the Association of Washington Cities, the Port of Seattle, Intercity Transit, the Amalgamated Transit Union, the Legislative Council of Washington and Michael Rogers ("plaintiffs") then filed suit in King County seeking a preliminary injunction. (King County Case No. 19-2-30171-6).

Judge Marshall Ferguson scheduled a hearing to consider plaintiffs' motion for a preliminary injunction for November 26, 2019. Prior to the hearing, Petitioners through counsel Stephen Pidgeon sought representation of their interests from the Attorney General (AG). The request was acknowledged but ignored. Petitioners filed a Motion to Intervene and Memorandum of Law, together with a Notice of Limited Appearance challenging venue on Friday November 22. Plaintiffs objected to Petitioners motion. See Declaration of Stephen Pidgeon.

A hearing was had, the AG arguing on behalf of the State of Washington, and plaintiffs appearing through counsel of record, and on November 27, 2019, Judge Marshall Ferguson of the King County Superior Court entered a preliminary injunction.

Petitioners objected to venue prior to the hearing, courtesy copies being forward to Judge Ferguson on November 22, and reiterate their objection here.

Given that King County was a party to the action seeking a preliminary injunction, any judge of the King County Superior Court is disqualified from hearing the matter. Petitioners assert that it is patently unreasonable to expect an impartial decision from a County Officer sitting on the bench presiding over a case where the County which employs him is a party. The lack of impartiality demands that 1) the venue be declared as disqualified *nunc pro tunc*; 2) the presiding judge of King County vacate the order granting preliminary injunction; and 3) the presiding judge of King County transfer the venue of the proceedings to this Court.

ARGUMENT

A. Mandamus

Mandamus is an extraordinary writ. The Supreme Court has original jurisdiction in mandamus with respect to all state officers. Const. art. IV, § 4. Mandamus is an extraordinary remedy that is granted only if the mandatory act sought to be compelled is not discretionary. *SEIU Healthcare 775NW v. Gregoire,* 168 Wash.2d 593, 598-99, 229 P.3d 774 (2010). "Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance." *McCleary v. State,* 173 Wash.2d 477, 269 P. 3d 227, 263 (2012), *citing Walker v. Munro,* 124 Wn.2d 402, 408, 879 P. 2d 920 (1994). The jurisdiction given to this court by the state constitution in Art. IV, § 4, to issue writs of mandamus to state officers, does not authorize it to assume general control or direction of official acts. *Walker v. Munro, op. cit., citing State ex rel. Taylor v. Lawler,* 2 Wn.2d 488, 490, 98 P.2d 658 (1940).

The remedy of mandamus contemplates the necessity of indicating the precise thing to be done. *Clark Cy. Sheriff v. Department of Social & Health Servs.,* 95 Wn.2d 445, 450, 626 P.2d 6 (1981) (*citing State ex rel. Hawes v. Brewer,* 39 Wash. 65, 80 P. 1001 (1905)).

> Mandamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties....
>
> ... It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile.

State ex rel. Pacific Am. Fisheries v. Darwin, 81 Wash. 1, 12, 142 P. 441 (1914) (*citing State ex rel. Hawes v. Brewer,* 39 Wash. 65, 67-69, 80 P. 1001 (1905)).

Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance. *See Clark Cy. Sheriff v. Department of Social & Health Servs., supra*. *Walker v. Munro,* 124 Wn.2d 402, 408, 879 P. 2d 920 (1994).

Finally, mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official. *Vangor v. Munro,* 115 Wn.2d 536, 543, 798 P.2d 1151 (1990); *State ex rel. Pacific Bridge Co. v. State Toll Bridge Auth.,* 8 Wn.2d 337, 342-43, 112 P.2d 135 (1941).

Mandamus will not lie if the party requesting the writ has an alternative and adequate remedy besides mandamus. *Gregoire,* 168 Wash.2d at 625, 229 P.3d 774. However for a remedy to be considered inadequate "`[t]here must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary

jurisdiction.'" *Id.* (internal quotation marks omitted) (*quoting State ex rel. O'Brien v. Police Court,* 14 Wash.2d 340, 347-48, 128 P.2d 332 (1942)).

B. Petitioners' Standing

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link,* 136 Wn. App. 685, 692, 150 P.3d 610 (2007). The doctrine of standing prohibits a party from asserting another's legal right. *West v. Thurston County,* 144 Wn. App. 573, 578, 183 P.3d 346 (2008). The rule ensures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute. *Lakewood Racquet Club, Inc. v. Jensen,* 156 Wn. App. 215, 223, 232 P.3d 1147 (2010).

Washington has long recognized litigant standing to challenge governmental acts on the basis of status as a taxpayer. *See, e.g., Tacoma v. O'Brien,* 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Calvary Bible Presbyterian Church v. Board of Regents,* 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967), *cert. denied,* 393 U.S. 960 (1968); *Fransen v. Board of Natural Resources,* 66 Wn.2d 672, 404 P.2d 432 (1965). Generally, a taxpayer must first request action by the Attorney General and refusal of that request before action is begun by the taxpayer. *See, e.g., Tacoma v. O'Brien, supra; Citizens Coun. Against Crime v. Bjork,* 84 Wn.2d 891, 893, 529 P.2d 1072 (1975). We have recognized, however, that even that requirement may be waived when "such a request would have been useless." *Farris v. Munro,* 99 Wn.2d 326, 329-30, 662 P.2d 821 (1983).

Petitioners made a request to the Attorney General who simply ignored the request. See Appendix D, Declaration of Stephen Pidgeon. Petitioners have affirmed in their Motion to Intervene and Memorandum of Law that they are all taxpayers in Washington, registered voters, voters who voted in favor of I-976, who own vehicles which are subject to licensing fees which would be directly impacted by the passage of I-976. See Appendix D.

C. Certain Plaintiffs Had No Standing

King County, the City of Seattle, the Port of Seattle, and the Garfield County Transportation Authority violated RCW 42.17A.555 by using public employees to prepare a legal challenge to I-976 before November 5, and by filing such a challenge before the end of the election and the effective date of the initiative.

Legal expenses to invalidate a ballot measure are "independent expenditures" under Chapter 42.17A RCW. RCW 42.17A.255 provides in applicable part as follows:

RCW 42.17A.255

Special reports—Independent expenditures.

(1) For the purposes of this section the term "independent expenditure" means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.225, 42.17A.235, and 42.17A.240. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person.

(2) Within five days after the date of making an independent expenditure that by itself or when added to all other such independent expenditures made during the same election campaign by the same person equals one hundred dollars or more, or within five days after the date of

making an independent expenditure for which no reasonable estimate of monetary value is practicable, whichever occurs first, the person who made the independent expenditure shall file with the commission an initial report of all independent expenditures made during the campaign prior to and including such date.

"[W]here litigation is being employed as a tool to block adoption of an initiative or to force an initiative onto the ballot, as was attempted here, the finances enabling such support (or opposition) would indeed appear to fall within the 'any expenditure,' triggering the reporting obligation [in RCW 42.17A.255]. The contention that litigation support does not qualify as a reportable independent expenditure ignores the express purpose of the FCPA in the context of modern politics." *State v. Evergreen Freedom Fund,* 192 Wn.2d 782, 798, 423 P.3d 805 (2019).

"[T]he phrase 'in opposition to' [in RCW 42.17A.255] is also unambiguous. Chapter 42.17A RCW lacks a definition of 'in opposition to.' However, looking to the dictionary definition, 'opposition' is defined as 'hostile or contrary action or condition: action designed to constitute a barrier or check.' Webster's Third New International Dictionary of the English Language 1583 (2002).

"Litigation expenses incurred to seek a judicial directive regarding whether measures may be placed on the ballot are reportable under RCW 42.17A.255. See Evergreen,192 Wn.2d at 787. And RCW 42.17A.255 unambiguously defines 'in opposition to' to include pre-election litigation expenditures on legal services to block an initiative. Thus, expenditures on legal services to block an initiative are necessarily independent expenditures subject to the statute's reporting requirements. *State v. Economic Development Board for Tacoma-Pierce County,* 441 P.3d 1269, 1277 (2019).

Legal expenses to strike down a ballot measure during an election or before the ballot measure takes effect are “independent expenditures.” Chapter 42.17A RCW specifies when activities in support of or opposition to a ballot measure becomes reportable but does not specify when such expenses need no longer be reported or when something is no longer a ballot measure.

RCW 42.17A.005(4) provides that a "Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.

RCW 29A.04.091 provides that a “Measure” includes a proposition or question submitted to the voters.

RCW 42.17A.005(19) provides that an "Election campaign" means any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a ballot proposition.

Although Chapter 42.17A does not specify when something ceases to be a “ballot measure,” it seems unlikely that courts would conclude that something is a “ballot measure” after it takes effect and becomes law. Nevertheless, it can reasonable be argued that legal expenses to oppose a ballot measure during an election or before it takes effect are reportable “independent expenditures.” While the formal date of the 2019 general election was November 5, 2019, the election did not conclude on that day. In fact, it is still going on. Washington’s 2019 general election results will be certified by counties on November 26. The results will be certified by the

Secretary of State on December 5. The earliest that any portion of I-976 will take effect is December 5, 2019.

Public officials may not use public facilities, including staff time or legal services, to oppose a ballot proposition. RCW 42.17A.55 provides that: "No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:"

The Court, in *State v. Economic Development Board for Tacoma-Pierce County, op. cit.,* found that "the Port made expenditures for legal services in opposition to the STW ballot propositions. Accordingly, the Port's use of its financial resources to oppose the STW ballot propositions falls within the conduct regulated by RCW 42.17A.555. The only question then, is whether an exception applies . . . The Port's lawsuit in opposition to the STW ballot propositions was neither 'normal and regular conduct' of the Port, nor merely a vote to express collective disapproval of the ballot propositions. As a result, the trial court erred by summarily dismissing the State's complaint regarding the Port's use of public funds to oppose the ballot propositions."

King County, the City of Seattle, the Port of Seattle, and the Garfield County Transportation Authority violated 42.17A.555 by using public employees to prepare a legal challenge to I-976 before November 5 and by filing such a challenge before the end of the

election and the effective date of the initiative. Accordingly, all their legal filings, claims of standing, and requests for a preliminary injunction preventing I-976 from taking effect are illegal and inappropriate. Government plaintiffs may not file legal challenges to I-976 before the initiative's effective date.

D. Duty Breached by Respondent

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (*quoting State v. Ladenberg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992), *reversed on other grounds by State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999)).

Petitioners do not agree with the notion that a King County Superior Court Judge, whose reelection depends on the votes of the people of King County, in an action brought in part by King County as a party, would or did deliver a fair, impartial, or neutral hearing.

CANON 1 of the Code of Judicial Conduct provides as follows:

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY. (Symbologized capitalization found in the original).

CJC 1.2 provides that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

CJC 2.11 provides that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (2) The judge knows that the judge . . .is: (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; or (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding.

Comment (1) to CJC 2.11 provides that "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.

Comment (2) to CJC 2.11 provides that "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

Comment (5) to CJC 2.11 provides that "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

Superior Court judges are state officers, whose offices are constitutionally established. Article IV, Section 5. ("There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election") and are elected in county-wide elections. The judges are employees of the county where they are elected.

RCW 4.12.030 in applicable part provides that the court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof (2) That there is reason to believe that an impartial trial cannot be had therein; or, (4) That from any cause

the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he or she is a party, or in which he or she is interested.

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge whose impartiality may be reasonably questioned. *State v. Dominguez,* 81 Wash.App. 325, 328, 914 P.2d 141 (1996).

The Code of Judicial Conduct 3(c)(1) provides in part that "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ladenburg,* 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992).

CONCLUSION

As it was said in *The Contre-League and Answere to Certaine Letters Sent to the Maisters of Renes, by One of the League who Termeth Himselfe Lord of the Valley of Mayne, and Gentleman of the Late Duke of Guizes Traine*, published in 1589: "…he is a wolfe to keep the sheep, and a foxe to looke to the hennes." Such a situation is readily perceived by those living outside of King County, including Petitioners. If a preliminary injunction is to be entered, or this Initiative is to be unconstitutional, let the decision be made by an impartial tribunal.

Respectfully submitted this 2nd day of December 2019.

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